IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

S.B. CRIMINAL APPEAL NO.791/2005
(Mithu Singh @ Maha Singh Vs. State of Rajasthan)

S.B. CRIMINAL APPEAL UNDER SECTION 374(2) Cr.P.C. AGAINST THE JUDGMENT DATED 30.09.2005 PASSED BY THE LEARNED SPECIAL JUDGE, N.D.P.S. CASES, HANUMANGARH IN SESSIONS CASE NO.32/2004 – STATE OF RAJASTHAN VS. MITHU SINGH @ MAHA SINGH.

DATE OF JUDGMENT : 19th November, 2007

P R E S E N T

HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. Mahesh Boda for the appellant.
Mr. JPS Choudhary, Public Prosecutor.

BY THE COURT :

1. This appeal is directed against the judgment & order dated 30.09.2005 passed by the learned Special Judge, N.D.P.S. Cases, Hanumangarh in Sessions Case No.32/2004, whereby, he

convicted accused appellant Mithu Singh @ Maha Singh for offence under Section 8/15 of the N.D.P.S. Act (hereinafter referred to as the Act) and sentenced him to twelve years' rigorous imprisonment and to pay a fine of Rs.1,20,000/-, in default of payment of fine to further undergo two years' rigorous imprisonment.

2. Facts leading to the present appeal are that on 28.7.2004, S.H.O. Sita Ram of Police Station Sangaria along with police party went for petrolling. At about 5.40 pm, he received a secret information at Malarampura Bus Stand that appellant Mithu Singh @ Maha Singh is doing business of poppy husk in his dhani at Chak 9 KSD. He thereupon prepared Memo Ex. P-14 for sending to his superior officer through Ex.P-15 and after informing motbirs, he reached at the dhani of accused appellant. A notice was given to him under Section 50 of the Act and 16 bags of poppy husk were recovered. The total quantity of poppy husk was 540 kgs. He took samples of 500 gms from each bag and after preparing recovery memo Ex.P-4, registered FIR Ex.P-17 and arrested the accused appellant and prepared the site plan Ex.P-18 and prior to it send the progress to his superior officer vide Ex.P-19. After investigation about samples etc. for chemical examination, challan was filed. Accused was charged for offence under Section 8/15 of the Act to which he pleaded

not guilty. Prosecution examined 12 witnesses. Statement of accused under Section 313 Cr.P.C. was recorded. After hearing, the learned trial Judge convicted the accused appellant as indicated above.

3. Learned counsel for the accused appellant has assailed the judgment of the learned trial court mainly on two grounds. Firstly, accordingly to him, there was no conscious possession of the accused appellant on the dhani, from where the recovery has been made, which according to him was belonging to his brother Harnam Singh. Secondly, he has questioned about the validity of the search and seizure on account of non compliance of Sections 42 and 57 of the Act and relied upon certain citations, which will be referred later on.

4. On the contrary, the learned Public Prosecutor has supported the judgment of the learned trial court and has submitted that the learned trial Judge has elaborately discussed both the grounds raised by the learned counsel for the appellant in his judgment.

5. I have gone through the evidence on record. As per the site plan Ex.P-18, X mark is the place from where recovery has been made in 16 bags. On the left side of it, dhani of accused

appellant Mithu Singh has been shown and on the right side at Mark 7, dhani of Harnam Sigh has been shown. According to the site inspection memo, dhani of accused appellant is in Chak 9 KSD. The most important witness in this regard is Patwari PW-5 Babu Lal Mughal. He has proved the jamabandi of Chak 9 KSD. In Ex.P-12 and Ex.P-13, names of three agriculturists have been shown i.e. Harnam Singh, Maha Singh and Jarnail Singh son of Gyan Singh of Malarampura. Maha Singh is also known as Mithu Singh. When the Patwari was cross examined, he has stated that this land has been shown as mortgaged with Punjab National Bank and when land is mortgaged, certificate of possession is obtained which was issued by Tehsildar and according to him, the possession of Chak KSD No.145/112 Murabba No.46 Kila No.10 to 12 and 19 to 22 was in possession of Harnam Singh, for which the certificate Ex.D-1 was issued. He also issued the certificate about Kila Nos.11 to 20 where dhani of Harnam Singh has been shown. In the last, he specifically stated that in Murabba No.46, Kila 10 to 12 and 19 to 22, there is neither possession of Mithu Singh nor his dhani is situated. If this statement of Patwari Babu Lal Mughal PW-5 is read with Ex.P-12 and Ex.P-13, which are copies of jamabandi and the site plan Ex.P-18 and site inspection memo Ex.P-18A, then it is clear that there was no exclusive or conscious possession of the accused appellant on the place from where the

recovery of poppy husk has been made. On this point, the Seizing Officer PW-6 Sita Ram has stated that he was posted at Sangaria 20 days' prior to the recovery and he was not personally known about the area and the dhani of different agriculturists. That apart, motbirs of recovery, PW-2 Kali Singh and PW-3 Harkewal Singh have turned hostile. Above evidence of possession does not inspire confidence in the story of the prosecution that the poppy husk was recovered from the place which was in exclusive or conscious possession of accused appellant Mithu Singh.

6. With regard to non compliance of the Sections 42 and 57 of the Act, it has been stated by the Seizing Officer PW-6 Sita Ram in his cross examination that when he gave notice to the accused Ex.P-6, there was sunset. Memo Ex.P-16 leaving for search in the absence of obtaining warrant was prepared at 6.30 pm and recovery has been made at 7 pm vide Ex.P-4. Normally, sunset time in the month of July is after 7 pm. When SHO PW-6 Sita Ram himself has said that he prepared the memo Ex.P-16 at 6.30 pm and issued notice under Section 50 of the Act to the accused appellant at 6.45 pm and conducted the search at 7 pm, this itself shows that either the timings in these documents have been fabricated or the Seizing Officer is telling lie that it was sunset. In the light of this statement of the SHO, the finding of

the learned trial court that there is no evidence to the effect that there was no sunset prior to the conduct of search is contrary to the record and consequently the compliance of Section 42 has not been made.

7. In the case of State of W.B. and others Vs. Babu Chakraborty, reported in AIR 2004 Supreme Court 4324, it has been held that failure to comply with Section 42(1), proviso to Section 42(1) and Section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused. Undoubtedly, PW-6 Seizing Officer Sita Ram was not the officer of the gazetted rank and he was not specially empowered to conduct the search by any general or special order. Section 42 sub-section (1) says that such officer, who is not empowered can make a search between sunset and sunrise and its Proviso says that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief and when doing so, he shall within seventy-two hours send a copy thereof to his immediate official superior under sub-section (2) of Section 42 of the Act along with report of arrest and seizure within 48 hours to

his immediate official superior. Here in this case, PW-6 Sita Ram, the Seizing Officer has failed to comply with the provisions of Section 42 as well as Section 57 of the Act because the Radiogram Ex.P-15 has been sent with Constable Ram Kumar, who has been examined as PW-9. This witness PW-9 Ram Kumar has said that he handed over the Radiogram at 7.15 pm to wireless operator Mahaveer. PW-10 Mahaveer has said that at 7.25 pm (19.25), he passed over the message to control room. But the superior officer who received the message has not been examined. Of course, PW-8 Rajendra Singh has said that he gave factual report in the S.P. Office vide Ex.P-20 but who received it has not been produced in the court.

8. In addition to the factum of conscious possession of the accused on the contraband article, compliance of mandatory provisions of Sections 42 and 57 of the Act has not been made, for which, accused is entitled to be benefited. The mandatory provisions under the Act are to be complied with by the Investigating Officers and the compliance has to be ensured by the learned trial judge, in the absence of which, a great prejudice is caused to the accused specially in cases of offence where stringent punishment has been provided for.

9. Consequently, the appeal is allowed. The judgment dated

30.09.2005 passed by the learned Special Judge, N.D.P.S. Cases, Hanumangarh, convicting accused appellant Mithu Singh @ Maha Singh for offence under Section 8/15 of the N.D.P.S. Act is set aside. Accused appellant Mithu Singh @ Maha Singh is acquitted from the charges levelled against him. He is in jail. He shall be released forthwith, if not required in any other case.

(DEO NARAYAN THANVI), J.

ms rathore